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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 597.

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

PETER G. TEN EYCK, as Commissioner of Agriculture and Markets of the State of New York, *et al,*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

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Opinion Below.

The opinion of the United States District Court for the Southern District of New York is reported in 11 Fed. Supp. 599.

Statute Involved.

The statute involved is Article 21 and Article 21-A of the Agriculture and Markets Law of the State of New York, added by Chapter 126 of the Laws of New York of 1934 (Laws of New York, 1934, p. 564; R. 35), generally known as the 1934 Milk Control Law.

The only part of the statute the validity of which is challenged in this suit is the last sentence of Section 258-q of Article 21-A which provides as follows:

> "* * * It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city." (Laws of New York, 1934, p. 580; R. 56.)

The foregoing provision is substantially a re-enactment of Section 317 (c) of Chapter 158 of the Laws of 1933 (Laws of New York, 1933, pp. 558, 570; R. 18, 34), generally known as the 1933 Milk Control Law. The 1933 Law was in its broad aspects similar to the 1934 Law; it was professedly of an emergency character and was by its terms to continue for a period of one year only. The 1934 Law was likewise enacted for a period of one year, but its operation was subsequently extended for a further period of one year by Chapter 10 of the Laws of 1935 (Laws of New York, 1935, p. 18).

The differential is effective only in New York City, which is the only city in the State having more than one million inhabitants. Its effect becomes apparent when read in the light of Section 258-m which provides in part as follows:

> "The commissioner shall investigate what are reasonable costs and charges for producing, hauling, handling, processing and/or other services performed in respect to milk, and what prices for milk in the several localities and markets of the state, and

under varying conditions, will best protect the milk industry in the state and insure a sufficient quantity of pure and wholesome milk to adults and minors in the state, and be most in the public interest. The commissioner shall take into consideration the balance between production and consumption of milk, the costs of production and distribution, and the purchasing power of the public.

"1. The commissioner, after making such investigations, may fix by official order:

"(a) The minimum prices to be paid by milk dealers to producers and others for milk in its various grades and uses * * *.

"(b) The minimum and/or maximum wholesale or retail prices to be charged for milk handled within the state for fluid consumption and wheresoever produced, when sold by milk dealers to consumers; by milk dealers to stores either for consumption on the premises or resale to consumers; by stores to consumers except for consumption on the premises where sold; by milk dealers to other milk dealers. A minimum wholesale or retail price to be charged for milk shall not be fixed higher than is necessary to cover the costs of ordinarily efficient and economical milk dealers, including a reasonable return upon necessary investment. *The fact that some dealers selling milk not having a well advertised trade name to stores in a city of more than one million inhabitants avail themselves of the privilege of making such sales at less than the minimum price shall not require fixing of the price higher than would otherwise be necessary.*" (Laws of New York, 1934, pp. 575-576; R. 50-52.)

STATEMENT.

Nature of Case.

Pursuant to the Milk Control Law minimum prices to be paid by all dealers to all producers have been fixed. This means that, unless the statute is being violated, the cost to all dealers of any particular grade of milk is uni-

form. Minimum prices for retail sales to consumers by house-to-house delivery have been fixed and they are likewise uniform.

The minimum price fixed for sales to stores (now 10¾¢ per quart) applies, however, only to dealers who have not been continuously engaged in business since April 10, 1933, and to the appellant and three other dealers* who have been designated by official order as having "well advertised trade names" for the purposes of the differential provision. The remaining dealers, some 200 in number, are permitted under the statute to sell their bottled milk to stores at 1¢ less a quart, and all of such dealers have in fact universally taken advantage of this privilege (R. 292, Finding 46). The stores in turn are permitted to sell to consumers the milk of these favored dealers at 11¢ a quart, although 12¢ must be charged for the milk of the appellant.

The appellant challenges this provision of the statute as an unreasonable and arbitrary discrimination against it in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution.

This suit was originally commenced on April 26, 1934 by an application for an interlocutory injunction pursuant to Section 380 of Title 28 of the United States Code (Judicial Code, § 266). The injunction was denied and the complaint dismissed for failure to state a cause of action (*Borden's Farm Products Company, Inc.* vs. *Baldwin*, 7 Fed. Supp. 352). On appeal to this Court the decision of the District Court was reversed and the case remanded, with direction that the application for an interlocutory injunction be heard and decided, the cause proceed to final hearing upon the pleadings and proofs, and the facts found and conclusions of law stated as required by Equity Rule 70½ (*Borden's Farm Products Company, Inc.* vs. *Baldwin*, 293 U. S. 194). The appellant subsequently filed an amended complaint and the case was referred to Honorable Charles C. Burlingham as Special Master to hear and de-

* The three other dealers are Sheffield Farms Company, Dairymen's League Cooperative Association and M. H. Renken Dairy Company (R. 35).

termine the application for an interlocutory injunction. After a full hearing the Special Master reported certain findings of fact and conclusions of law and recommended that the interlocutory injunction be granted. The exceptions to the report of the Special Master were heard by the same statutory court of three judges and the Court overruled his conclusions of law, held Section 258-q of the Milk Control Law in all respects constitutional, and again dismissed the complaint upon the merits. The findings of fact recommended by the Special Master were, in form at least, all adopted by the Court, together with two additional findings which he refused to recommend.

Probable jurisdiction was noted by this Court on December 16, 1935.

Statement of Facts.

Background of the Milk Control Law.

The 1933 Milk Control Law had its origin in a serious decline in the price of milk which commenced in 1931. In the Spring of 1932 the New York Legislature appointed a joint legislative committee known as the Pitcher Committee "to investigate the causes of the decline of the price of milk to producers and the resultant effect of the low prices upon the dairy industry and the future supply of milk to the cities of the State * * *" (R. 282, Finding 2; Report of the Joint Legislative Committee to Investigate the Milk Industry [hereinafter referred to as the Pitcher Report], Legislative Document (1933) No. 114, p. 9).

The Pitcher Committee found that among the principal factors contributing to such decline in prices were overproduction, unequal distribution of the resulting surplus and the prevalence of unfair and destructive trade practices in the distribution of milk leading to demoralization of prices in the New York Metropolitan market (R. 283, 285, Findings 5, 13; Pitcher Report, pp. 14-17).

After an exhaustive investigation the Pitcher Committee submitted its report to the Legislature early in 1933 and

made recommendations concerning remedial legislation which formed the basis of the 1933 Law. The Committee recommended that uniform minimum prices to the producer be fixed on the basis of the classified price plan discussed below and suggested that minimum prices might be fixed for milk sold to consumers and other customers. It made no reference to any differential or penalty against dealers having "well advertised trade names." The bill as drafted by the Committee and introduced in the Legislature contained no provision for minimum prices on sales by dealers to stores and consumers, but it was subsequently amended in this respect. Just prior to its passage and without further legislative investigation of facts it was again amended to include the differential provision challenged in this suit (R. 290, 291, Findings 39, 42; Pitcher Report, p. 17).

Before the expiration of the 1933 Law, the Milk Control Board, as the agency charged with its administration, made a report to the Legislature recommending the re-enactment of the Law with certain proposed amendments. It made no recommendation with respect to the continuance of the differential provision and the bill introduced in the Legislature contained no such provision (R. 291, Finding 43). Again it was inserted by amendment.

In the report submitted by the Director of the Division of Milk Control to the Legislature in 1935 prior to the extension of the 1934 Law for a further period of one year, the only reference to the differential provision was embodied in a statement that the existence of the differential had resulted in numerous violations of price-fixing orders in New York City and had made the market unstable (R. 155-156).

Thus the extraordinary digression in the field of legislative price-fixing provided by the statutory differential lacks the sanction of the legislative fact-finding body whose report formed the basis of the 1933 Law and of the several State officers and agencies which have been charged with the administration of the 1933 and 1934 Laws.

The various requirements imposed by law as to minimum butter fat content, bacterial count, pasteurization and other matters relating to quality, purity and sanitariness are the same for the milk sold by all dealers in New York City (R. 290, Finding 36); the services performed for the stores by all dealers are the same (R. 290, Finding 37); and the stores have been required since the enactment of the 1933 Law to collect on the sale of bottled milk of all dealers a uniform bottle deposit of 3¢ (R. 292, Finding 46). In other words, the differential imposes different prices for equal products and equal services.

The justification which has been advanced for the statutory differential is founded for the most part upon an alleged difference in price between advertised and unadvertised milk in New York City antedating the Milk Control Law (R. 297, 298, Findings 66, 68-70). Whatever may be the essential accuracy of the findings on this point, which was the subject of a mass of conflicting testimony, the findings standing alone and without appropriate qualification are wholly misleading and, in effect, clearly contrary to the evidence. Prices and price relationships in New York City in the years preceding the Milk Control Law were so intimately connected with and affected by other market conditions that any attempt to express them categorically without reference to attendant circumstances cannot fail to result in error. Chief among the factors affecting the market were the abolition of bulk ("loose" or unbottled) milk and the handling of surplus milk.

The New York City Markets Before the Threat to Bulk Milk.

In most American cities the sale of bulk milk has been prohibited for many years, but it continued to be lawful in New York City until June 1, 1933* (R. 287, Finding 25). Before the Fall of 1931 when there arose the agitation which led to the ban on this method of selling, over 75% of the

* It is still lawful in New York City to sell bulk milk to restaurants and hotels.

milk sold through stores in New York City was sold in bulk form (R. 285, 289, Findings 16, 33). This was true because bulk milk could be purchased in the stores at about 5¢ a quart less than bottled milk and because the price of bottled milk was generally the same in the stores as it was on the dealers' retail routes (Pitcher Report, pp. 246-249). Add that the store purchaser was obliged to make a 5¢ bottle deposit and to put up with the nuisance of returning the empty bottle in order to get back his deposit, and it can readily be seen that there was little incentive for a consumer to buy bottled milk regularly at the stores (R. 289, Finding 32). It is to be inferred that the bottled milk that was sold in the stores consisted largely of extra purchases by consumers who obtained their normal supply as the result of house-to-house deliveries, and of casual purchases by persons who were not in need of a regular supply. The great mass of the store purchasers were not, however, in either of these classes; they were, instead, persons of slender means, or persons who, for one reason or another, were indifferent to sanitary considerations in making their purchases (R. 293, Finding 49). The appeal to these buyers was primarily that of price; and until the abolition of bulk milk became really imminent there was no serious effort by most of the dealers to sell bottled milk to this part of the market. In so far as the dealers were concerned bottled milk sold through stores was a nuisance, and such of the dealers as handled bottled milk at all did so largely in order to assure their retention of the bulk milk business.

The Abolition of Bulk Milk.

The agitation for the abolition of bulk milk finally became so serious in New York City that the board of health appointed a commission to make a study of the question and report on the advisability of effecting such a reform. In November, 1931 this commission recommended that the sale of bulk milk be forbidden and its recommendation was subsequently carried out by an ordinance which, after sev-

eral postponements, became effective on June 1, 1933 (R. 287, Finding 25).

With the end of bulk milk in prospect, everyone in the milk business was of course aware that the character of the preexisting markets was about to be radically changed. The old store market for bottled milk had been distinctly a quality market; it had consisted of persons who were willing to pay 5¢ a quart more for their milk in order to get it in bottles and to deposit another 5¢ a quart for the bottles themselves and put up with the annoyance of returning empty bottles to the stores, or forfeiting the deposit. The bulk milk purchasers, on the other hand, were persons who were interested primarily in price; their acceptance of bulk milk despite its obvious hygienic demerits is proof enough of that; and the proposal was to add them all to the theretofore narrow store market for bottled milk. Since the bulk milk purchasers were about four times as numerous as the store purchasers of bottled milk, this could only mean that the old quality market was to be transformed into one that would respond principally to the appeal of price, a characteristic that was certain to be enhanced by the existing depression. A dealer who could sell bottled milk at a lower price than his competitors was sure to have a very great advantage in the new market; and by reason of certain peculiarities of the milk business, the "independents" were at that time enabled "to engage very generally in price-cutting". (Pitcher Report, p. 17.)

Surplus Milk and the Advantage Derived Therefrom by the "Independent" Dealers.

Milk, unlike most farm products, is produced continuously throughout the year, but the amount is subject to great seasonal variation. Thus the amount produced in the month of June when production is at the peak is usually about twice as great as the amount produced in November when production ordinarily reaches its lowest point. Since milk is a perishable product in daily demand, it is necessary

that the amount produced at the lowest point be adequate to provide for normal demand. The inevitable result is that during the remainder of the year more milk is produced than is required for fluid consumption. This surplus must be utilized in the manufacture of butter, cheese, condensed milk and like products (R. 284, Finding 9; Pitcher Report, pp. 38-40, 120).

Consumption is also subject to seasonal variation, although to a much less extent than production, and is subject in a marked degree to daily fluctuation, depending on the weather, the day of the week, holidays, the current of movement of persons in and out of the City and similar factors. This fluctuation creates a problem for the dealers, since they must be prepared to meet sudden changes in consumer demand on a moment's notice. The appellant and other large dealers have for many years met the problem by contracting with producers' associations for their maximum requirements. Thus they have contracted to take the total output of a sufficient number of producers to assure them an adequate supply in the period of shortest production. The surplus resulting in other periods of the year in the hands of the larger dealers has been disposed of by them in the form of manufactured products. The smaller dealers, on the other hand, have generally contracted only for their minimum requirements and depended upon emergency purchases when threatened with a shortage (R. 285, Finding 13).

Before the Milk Control Law there was not only a difference between the dealers in the methods of providing for consumer demand; there was also a fundamental difference in the basis employed for determining the price of the milk purchased.

Milk used for fluid consumption in New York City must be produced under sanitary requirements which add measurably to the cost of production. Milk used for manufactured products in other parts of the United States and foreign countries is produced under lower cost conditions.

Since similar products manufactured in New York from surplus milk must be sold in competition with those produced elsewhere, surplus milk has always commanded a low price which has been inadequate to cover the higher cost of production in New York (R. 284, Finding 10; Pitcher Report, p. 39).

In order to prevent these lower prices for surplus milk from continually depressing the fluid milk market, the producers' cooperative associations supplying the larger dealers initiated a number of years ago the practice of selling on the basis of what is known as the "classified price plan." Under this plan milk was paid for by the dealer upon the basis of its utilization, milk used for fluid consumption (known as Class 1 milk) commanding the highest price and milk used for various manufactured products commanding successively lower prices. The practice was for the appellant to buy its milk on credit and settle for its purchases after the end of the month. The price then paid was a blended price,—that is, a weighted average of the prices payable for the various amounts of milk utilized for each of the several classified purposes during the preceding month (R. 283-284, Findings 6, 7; Pitcher Report, pp. 109-121).

Prior to the Milk Control Law the "independent" dealers were accustomed to purchase the greater part of their milk from unorganized producers and to pay for such milk a flat price equal to or slightly higher than the blended price paid by the appellant and the other large dealers (R. 284, Finding 11). Thus all producers received approximately the same price for their milk regardless of who was the purchaser. The cost to the advertised and "independent" dealers, however, was very far from being equal because of the fact that the "independent" dealers sold almost entirely for fluid consumption (R. 284, Finding 11; Pitcher Report, p. 96). Since under the classified price plan surplus milk always commanded a lower price than milk sold for fluid consumption (Class 1), the blended price paid by

the larger dealers was always lower than the Class 1 price, the difference depending on the amount of surplus milk and the prices obtainable in the world market. Since the "independents" paid the blended price but sold almost entirely for fluid consumption, their costs were lower than those of the advertised dealers by the amount of this difference between the Class 1 price and the blended price (Pitcher Report, p. 96). Any reduction made in the Class 1 price for the purpose of offsetting this buying advantage on the part of the "independents" necessarily resulted in a lowering of the blended price, which in turn restored the buying advantage. The costs of the advertised and "independent" dealers could not be entirely equalized unless the Class 1 price were reduced to the price of surplus milk, and it was the progressive tendency toward this dangerously low level of milk prices that led to the enactment of the Milk Control Law (Pitcher Report, p. 97).

Under normal conditions the advantage enjoyed by the smaller dealers was not of great significance, except during the season of the peak in the producers' surplus; at other times of the year, when production and the demand for fluid consumption were more nearly equated, the surplus carried by the appellant and the other large dealers greatly decreased, and the blended price more nearly approximated the Class 1 price. For these reasons, under normal conditions, price-cutting by the smaller dealers tended to be a sporadic and seasonal phenomenon. It sprang up in the spring, when the surplus was increasing; but it died down and disappeared under the strong demand of the midsummer months and the diminishing supply of the fall (Pitcher Report, pp. 96-97).

Conditions, however, were by no means normal when the prohibition of bulk milk became effective; or, indeed, when it first was threatened. The depression was far advanced when the Loose Milk Commission was appointed, and consumer demand by that time had so decreased that a huge producers' surplus existed all the year around.

This situation was further aggravated by the fact that the peak of the milk production cycle happened to fall within the period in question. The tendency of milk producers to rear too many heifers when conditions in the milk business are good results in a well-defined cycle of milk production of about 15 or 16 years' duration, the up-swing in which coincided with the period of transition in the New York City markets caused by the ban on the sale of bulk milk (Pitcher Report, pp. 15, 39). As a result of this fortuitous circumstance, the producers' surplus during this period was so great, so continuous, and so dependable, that the host of small dealers in New York City were enabled to dispense with contract-buying altogether; to carry on price-cutting the whole year around; and to cover themselves at almost any price at which they cared to sell, by purchases at depressed prices in the surplus market.

The Bottle Deposit and the Advantage Derived by the Appellant from Abandoning It.

The price-cutting activities of the "independent" dealers began to be observable early in 1931, but it was the publication of the report of the Loose Milk Commission in November of that year which set the price wars going in earnest. The appellant early saw that it had little chance of selling at the same price as the "independents" in so far as it must depend upon the price of the milk it purchased; the best it could hope to do would be to pursue the "independents" down a price-cutting spiral, with the "independents" always one jump in the lead. Rather than pursue this futile course the appellant sought to meet the price-cutting tactics of the "independents" by abandoning, in July, 1931, the 5¢ bottle deposit requirement on store sales (R. 289, Finding 32).

The appellant anticipated that it could do this at a minimum of cost by collecting the empty bottles as it made the rounds of its retail routes. In this it had an advantage

over the "independent" dealers who had very few retail routes and could not respond in kind (Pitcher Report, p. 257). The result was that the total amount paid by the store purchaser for the appellant's milk was less than for that of the "independents," and in addition the purchaser was relieved of the necessity of returning empty bottles to the stores.

As a competitive measure, it proved quite effective.* It was equivalent to a drop in price of approximately 2¢ per quart (R. 289, Finding 32). Some of the "independents" responded by dropping their price to the stores a cent or two, but they all continued their customary 5¢ deposit requirement (R. 289, Finding 32). The cost to the appellant, however, proved somewhat greater than had been expected (Pitcher Report, p. 257). Despite this it continued to do business without a deposit requirement through all the period of the price wars until the Fall of 1932 when, with the first Milk Control Law in prospect and in an effort to stabilize the market in cooperation with a committee of producers, the appellant again asked a bottle deposit on its store sales. But the deposit it then asked was a 3¢ deposit as contrasted with the 5¢ deposit which the "independents" continued to require (R. 289, Finding 32; Pitcher Report, pp. 257, 262).

The Price Wars after November, 1931, and the Enactment of the Milk Control Law.

The publication of the report of the Loose Milk Commission in November, 1931 "was the signal for the launching of intensive drives by large and small distributors for a larger share of the store trade in bottled milk." (Pitcher Report, p. 246.) The increasing amount of surplus milk seeking a market outlet, combined with the resulting ability of the "independent" dealers to purchase their requirements at greatly reduced prices and the effort of the appel-

* The only other dealer adopting this expedient was Sheffield Farms Company, another of the advertised dealers.

lant to offset such buying advantage by abandoning the bottle deposit, rapidly translated these "intensive drives by large and small distributors" into unremitting price warfare. The battle lines were not between "independents" on the one side and the advertised dealers on the other; it was rather a case of every dealer seeking to obtain as much of the market as he could for himself by any means available. The market for the sale of bulk and bottled milk through stores was in a chaotic condition and wide variations in the prices charged for the milk of all dealers existed throughout the City. Widespread price-cutting resulted in a steadily declining price level. The price of bottled milk to stores sank from 13¢ per quart in November, 1931, to 6¢ or less in March, 1933 (R. 288, 297, Findings 26, 67). The prices charged the consumer fell proportionately; stores in exceptional cases sold bottled milk as low as 3¢ per quart and sometimes even gave it away (R. 288, Finding 29).

Thus at no time after bottled milk became an important factor in the wholesale* or store business in New York City were conditions sufficiently stabilized to afford any gauge of normal price relationships. There was complete and continuing chaos from November, 1931, until the Milk Control Law fixed a compulsory bottom for the market.

The cut-throat selling that convulsed the market was primarily at the expense of producers, since dealers had to cover their sales by purchases at comparable figures. Prices fell below the cost of production, farmer bankruptcies became increasingly frequent and a drying up of the public milk supply appeared imminent.

The basic fault in the entire structure was obviously the "independent" dealers' practice of purchasing their fluid milk requirements at lower prices and their resulting ability to engage in price-cutting, which forced the larger

* "Wholesale" as used in the New York City milk trade includes dealers' sales to stores, restaurants, etc., *and* store sales to consumers; "retail" means only house-to-house delivery of bottled milk directly to the consumer (R. 285, Finding 14).

dealers to protect their business by lowering the prices paid to the cooperative associations of producers which supplied them. The only solution for this vicious circle was the universal application of the classified price plan, and this was the principal recommendation of the Pitcher Committee (Pitcher Report, p. 17). This one step might well have been sufficient to remedy the situation, but the Legislature apparently thought it advisable to provide for the fixing of prices all along the line from producer to consumer.

With the enactment of such a statute in prospect the "independent" dealers insisted, and quite justly, that the old practice of selling bottled milk in the stores at the same price as on the retail routes be no longer permitted; with bulk milk about to be outlawed that practice constituted a serious threat to the great majority of "independents" who were not engaged in the retail business. And since there was a real difference in service between the two methods of sale, a compensatory difference in price was justified.

But the "independents" were not content with protection. They realized the character of the market at stake and insisted that the Legislature enact the further differential which the appellant now attacks. They stated to certain members of the Legislature that there was a custom for their milk to be sold through stores in New York City for 1¢ per quart less than the milk of the well advertised dealers and that they would lose their business if compelled to sell at the same price, and in turn their producers would lose the outlet for their milk. They urged the threat of monopoly and eventual higher prices to the consumer (R. 290-291, Findings 40, 41). They even argued paradoxically that fairness required that if they were to be deprived of their buying advantage there should be preserved to them the selling advantage which rested upon it.

The "evidence" thus presented was characterized by the Special Master as follows:

> "The differential provision was an afterthought, put into the bill in the interest of the independent

> dealers. In the last stages of its progress the 1933 bill was amended by adding the differential clause. There being no legislative report on the amendment, I permitted members of the legislature to testify to what was said in a legislative conference and committee on the subject of a differential. (Findings 40 and 41) I tried to limit the evidence to facts, but these were scanty; the testimony shaded off into opinions, and afforded little reliable information as to the reasons for the amendment." (R. 304.)

The pleas of the "independents" were highly successful, and without any attempt to verify the unsupported and self-serving statements made by them, the Legislature inserted the differential in the Law by a last minute amendment (R. 291, Finding 42).

When the bill to re-enact the Milk Control Law came before the Legislature in 1934 the "independents" again marshalled their forces to restore the differential which the Milk Control Board had omitted from the proposed bill which it submitted. In addition to the old arguments, the "independents" urged that store customers in New York City had become accustomed to paying 1¢ more per quart for the milk of the well advertised dealers (R. 291, Finding 44). They neglected to add that by the same token these customers had likewise become accustomed to purchasing far less of the advertised milk since the enactment of the differential! Again the Legislature inserted the differential without further investigation.

In this manner the "independent" dealers obtained what is in effect a monopoly of the right to make a price appeal to the price-conscious consumers who had previously purchased bulk milk; and, to make such monopoly the more secure, the "independents" obtained it not only against the appellant and the other advertised dealers but also against all dealers entering the field after the date of the enactment of the 1933 Law, whether they advertised or not.

The Loss to the Appellant Resulting from the Differential.

There are no findings as to the exact extent of the aggregate losses of all the advertised dealers since the enactment of the Milk Control Law but there are complete findings as to the losses sustained by this appellant. The differential has been in effect since April 10, 1933, but the full force of its impact upon the appellant's business was not felt until after the ban on bulk milk became effective on June 1, 1933. In the week of June 8, 1933, which was the first full week after the ban on bulk milk, the daily average of the appellant's sales of Grade "B" bulk and bottled milk to stores in New York City dropped 21,054 quarts below its daily average during the week ending May 25, 1933, the last full week before the effective date of such ban (R. 297, Finding 62). Since that time the appellant's store sales have diminished steadily except for minor fluctuations due to corresponding variations in general consumption (R. 295, 299, Finding 57; Table I incorporated by reference in Finding 51). For the week ending November 8, 1934, the appellant's daily average sales of bottled milk to stores in New York City were 42,000 quarts below its daily average for the week ending June 8, 1933 (R. 297, Finding 63). The evidence in the record does not cover the appellant's operations since November, 1934.

That the appellant's losses are attributable to the differential is established by the finding that the advertised dealers have had a smaller proportion of the total sales of bottled milk to stores since the enactment of the Milk Control Law than they did before (R. 287, Finding 23). The Court below, however, expressed some doubt whether "the differential has really damaged the plaintiff at all." A study of the reasons assigned by the Court for such doubt reveals that it was occasioned by an incomplete view of the facts appearing in the record and by at least three major errors as to certain of the facts to which the Court did give heed.

(1) The Court below first said that Findings 20 and 22 (R. 286, 287), when taken together, seemed to show that the proportion of store sales of the advertised dealers had risen slightly between October, 1933 and November, 1934. The Court's conclusion evidences a misconception of these findings. Finding 20 relates to the number of milk routes operated by the various dealers and states that in October, 1933 the advertised dealers had 32.6% of the wholesale routes. Finding 22 relates to the amount of bottled milk sold to stores over such wholesale routes and indicates that in November, 1934 the advertised dealers sold approximately 35% of the total. Since there is no necessary relation between the number of routes operated and the amount of bottled milk sold, these findings afford no basis for the inference which the Court sought to draw from them, and there is no inconsistency between them and Finding 23 that the advertised dealers have had a smaller proportion of the store business since the enactment of the Milk Control Law (R. 287, Finding 23).

(2) The Court then pointed out that the consumption of milk generally had fallen in the past six years and that for the Metropolitan market in 1934 it was only five-sixths of what it had been in 1929; it added that the appellant's total business had not suffered so severely. Any conclusions based upon the appellant's total business in the entire Metropolitan market are irrelevant for two reasons. First, the increase or decrease in the appellant's total business does not affect in any manner the loss sustained by the appellant in the sale of bottled milk to stores, to which the differential alone relates; second, the volume of the appellant's business in the entire Metropolitan market* does not afford an accurate gauge since the operation of the differential is confined to New York City. The substantial

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*The New York Metropolitan market comprises all of New York City and certain adjoining parts of New York, Connecticut and Northern New Jersey as shown by a map opposite page 32 of the Pitcher Report (R. 282, Finding 3).

increase in the appellant's store sales in the Metropolitan market outside New York City serves only to emphasize the damaging effect of the differential (R. 295, 297, Findings 56, 65). It may be noted in passing, moreover, that the appellant's total business has not kept pace with the Metropolitan market as a whole. Between 1929 and 1934 there was a percentage decrease in total consumption amounting to 15.4% and a percentage decrease in the appellant's business of 19.8% (R. 294, 296, Findings 54, 61). It would seem, therefore, that the Court was mistaken in the computations which it made.

(3) In analyzing the appellant's sales to stores in New York City, the Court took the month of November, 1933 as a base period for comparative purposes. Since the 1933 Law went into effect on April 10, 1933, the appellant's sales in November, 1933 had already been subjected to the erosive effect of the differential for a period of some six months. The findings include figures for November, 1932 and earlier periods, but for reasons not stated in the opinion the Court chose to ignore them.

If the proper figures are substituted for those used by the Court below it appears that the appellant's daily average store sales in New York City in November, 1932 were 294,878 quarts; in November, 1934 they were 208,424 quarts, and if the debatable item of relief milk is included they were 246,806 quarts, or a loss of 48,072 quarts daily (R. 295, Finding 58). The loss would be somewhat larger if the base were taken closer to the effective date of the differential because both general consumption and the appellant's store business increased between November, 1932 and April, 1933 (R. 295, 299, Finding 57, Table I).

The appellant accedes to the view of the Court below that no losses can be attributed to the differential except those which may be disproportionate to the decrease in general consumption. The decrease in consumption in the Metropolitan market between November, 1932 and Novem-

ber, 1934 was approximately 4.6% (R. 293, Finding 51). The decrease in the appellant's store business (including relief milk in November, 1934) was about 16.3% (R. 295, Finding 58). The difference between these figures, which is not attributable to the decrease in consumption, amounts in terms of quarts to an average loss of 34,501 quarts a day.

It is obviously impossible to prove that all of this loss was caused by the statutory differential. There are the additional hypotheses that the loss resulted from the appellant's inefficiency and that it resulted from a disproportionate shrinkage in the New York City store market. The first of these hypotheses is without support in the record; the second is directly contradicted by the finding that since 1930 there has been a trend from retail sales of bottled milk to sales of bottled milk through stores (R. 285, Finding 17). Furthermore, if either or both of these hypotheses were well founded it would be natural to expect that the appellant's losses had accrued gradually. If, on the other hand, the differential was the effective cause of the losses to the appellant, the greatest single amount of the appellant's losses would occur when the ban on the sale of bulk milk took effect. The shift at such time from bulk milk to the next cheapest thing, which under the statutory differential was the bottled milk of the independent dealers, would naturally result in a substantial and abrupt loss in the appellant's store business, and this we have seen is exactly what occurred. There was a difference of 21,054 quarts between the appellant's daily average store sales in New York City during the last full week before and the first full week after the ban on bulk milk became effective. Such a sudden drop in the appellant's business occurring at that particular time can be explained only as a direct result of the differential. Consumption was then mounting and the appellant's store business had been gaining steadily up to the moment when bulk milk was outlawed (R. 295, 299, Finding 57; Table I).

Whatever may be argued concerning the cause of the additional losses subsequently suffered by the appellant the relation between the differential and this immediate loss of 21,054 quarts daily cannot be impeached.

The Appellant Has No Adequate Remedy at Law.

Under the 1934 Milk Control Law the appellant, as a milk dealer, was required to obtain a license in order to operate after May 1, 1934 (R. 12). Unless such license were obtained the continuance of its business was illegal and likewise it was illegal for the appellant's store customers to purchase milk from it (R. 15). In order to obtain the license the appellant was required to file with the respondent Commissioner an application in which, among other things, it undertook to comply with all rules, price-fixing orders and other orders made by the Commissioner, including the rules and orders relating to the differential in suit (R. 12). The appellant tendered to the Commissioner an application for a license and the fee therefor, and in all respects obeyed the requirements of the Commissioner except that it objected to compliance with the rules and orders relating to the differential. Because of this refusal the appellant's application was rejected (R. 12). The same procedure was followed with the same result in connection with the application of the appellant for a license to operate after May 1, 1935 under the provisions of the Act extending the operation of the 1934 Law for a further period of one year.

When the appellant applied for a license in 1934 its sales of bottled milk in New York City involved several hundred thousand separate transactions daily. Unless the appellant obtained a license, or was protected by injunction, each such transaction rendered the appellant and its officers, agents and employees liable to a penalty of $200 and to fines in an equal amount for each bottle of milk sold, and also rendered the appellant's officers, agents and employees liable to im-

prisonment (R. 13, 62-64). In addition the appellant's store customers were liable to similar penalties, fines and imprisonment (R. 15).

The appellant could not have attempted to challenge the validity of the statute and orders complained of by a single isolated violation. By reason of the differential it has suffered a substantial loss in business in sales to stores in New York City. The forced operation of this part of its business at a price 10% higher than the majority of its competitors has daily subjected the appellant to irreparable injury.

The appellant is now operating under a temporary restraining order granted by Judge Caffey at the inception of this suit and since continued by successive orders of the statutory Court, by the terms of which the respondents are restrained from enforcing against the appellant, or any of its customers, any of the penalties provided in the Agriculture and Markets Law by reason of the appellant operating without a license, so long as it complies with all the provisions of the Law and of the rules and orders of the respondent Commissioner, except those requiring the appellant to agree to obey the rules and orders relating to the differential (R. 12, 322).

Assignment of Errors.

The assignment of errors is as follows (R. 324):

1. The Court below erred in overruling the exceptions filed by the appellant to the findings of fact made by the Special Master numbered 66, 68, 69 and 70 (R. 297, 298).

2. The Court below erred in overruling the exceptions filed by the appellant to the failure of the Special Master to make the finding of fact set forth in paragraph 3 of the said exceptions (R. 306).

3. The Court below erred in making additional findings of fact numbered 71 and 72 (R. 320-321).

4. The Court below erred in overruling the conclusions of law of the Special Master.

5. The Court below erred in denying the interlocutory injunction and the permanent injunction prayed for by the appellant and in dismissing the complaint upon the merits.

6. The Court below erred in holding that the last sentence of Section 258-q of the Agriculture and Markets Law and the orders adopted by the respondent Commissioner pursuant thereto did not deprive the appellant of its property without due process of law and did not deny the appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Summary of Argument.

I. The differential is an arbitrary and unreasonable discrimination which has not been endorsed by any impartial investigating or administrative State agency and has no relation to any difference in cost, quality, service or mode of operation.

II. The differential is directly at variance with the avowed purpose of the Milk Control Law to promote the welfare of producers.

III. The "special" justification heretofore advanced by the respondents based upon a pre-existing difference in price is not borne out by the facts; the radical change which occurred in the New York City market by reason of the abolition of bulk milk precluded the existence of any competitive precedent for the statutory differential.

IV. The differential cannot be sustained as an effort to safeguard existing dealers against injury which might result from the State's emergency price-fixing since serious injury to the appellant was a certainty and has in fact occurred.

V. Neither can the differential be sustained as an effort to preserve the "independent" dealers in the public interest since there is no reasonable ground for believing that they would be eliminated in the absence of the differential.

VI. The differential cannot be justified upon any ordinary principles of price-fixing since it bears no relation to the cost or quality of the product sold or of the services rendered. It is not designed to regulate advertising, nor is it intended to curb monopoly or to preserve freedom of economic opportunity.

VII. The differential is in reality a thinly veiled attempt by the "independent" dealers to preempt the New York City store market.

VIII. The novel character of the differential and the drastic penalty which it imposes require that a clear factual justification for it be shown. Even if a difference in price existed in the New York City market prior to the Milk Control Law, it was not of such a character as to afford a reasonable or sufficient basis for the statutory differential.

IX. The principle involved in the differential is fundamental. To sanction it would lead to dangerous and far-reaching consequences.

X. The differential is not an integral part of the Milk Control Law and may be declared invalid without invalidating the remainder of the statute.

ARGUMENT

I.

The differential constitutes an arbitrary and unreasonable discrimination against the appellant and others similarly situated.

That the differential is discriminatory is immediately self-evident.

The State first prescribes the standards and classifications of milk and the conditions under which it may be sold. The State then proceeds to fix uniform minimum prices to be paid to producers in order that each producer will be assured the same price for the same grade of milk. The State next prescribes minimum prices at which milk may be sold to stores and by stores to consumers, but in so doing it provides that the milk sold by certain dealers must be sold at a higher price than the same grade of milk sold by other competing dealers. Fair and open competition in the sale of the same product in the same manner is forbidden.

The sole distinction upon which this discrimination is based is the possession of a "well advertised trade name." But since any benefit derived from the advertising of a product so essential to health would be immediately lost if the milk were inferior, it is not the fact of advertising which, in reality, constitutes the criterion, but the good reputation which the appellant and other dealers similarly situated have created over a period of years. The "well advertised trade name" is merely the symbol and not the substance of this unusual and drastic penalty.

Certainly the element of advertising, or the possession of a "well advertised trade name", constitutes a wholly artificial and inadequate distinction upon which to base a discrimination so far-reaching in its effect.

The reasonableness of the classification established by the differential is further to be judged in the light of the following considerations:

1. It Has Not Been Advocated by Any Impartial Investigating or Administrative Agency.

The differential was not recommended by the Pitcher Committee after its thorough investigation nor by the State agencies charged with the administration of the 1933 and 1934 Laws. It is not a feature of any considered policy nor the product of careful analysis by the economic and social experts delegated by the State to study the situation and to formulate appropriate remedies.

2. It Has No Relation to Cost.

There is no evidence in the record and no contention has been made that the differential is based upon the cost of advertising or upon the general costs of the advertised dealers in operating their businesses. The appellant's advertising costs are less than one-eighth of a cent per quart of bottled milk sold (R. 289, Finding 35).

3. It Has No Relation to Quality.

The differential is not based upon any difference in the quality of the product sold. The milk which the appellant's competitors may sell at 1¢ less must adhere to the identical classification standards as the appellant's milk (R. 290, Finding 36).

4. It Has No Relation to Service.

The differential is not based upon any difference in the amount or nature of the services rendered. The services performed for the stores by all dealers are the same (R. 290, Finding 37).

5. It Is Not an Attempt to Regulate or Discourage Advertising.

The differential would continue to apply against the appellant regardless of the form its advertising might take, or even if it should cease such advertising altogether.

6. It Is Not Aimed at Unfair Practices.

There was no finding by the Pitcher Committee nor is there any suggestion in the record that the advertised dealers were guilty of any unfair practices.

7. It Is Not Directed Against Monopoly.

The differential is not related to the size or nature of the business of the dealers against whom it applies. Neither in the wording of the statutory provision nor in fact is there any basis for its application other than the possession of that uncertain thing called a "well advertised trade name."

Thus it is clear that the discrimination has no other basis than a difference in reputation or good will. Two competitors may be in all respects alike, but if one has a "well advertised trade name" he is compelled to sell at a higher price and is not permitted to meet on equal terms the competition of rival dealers. The differential has in purpose and inevitable effect the imposition of a penalty upon the reputation of one competitor—upon the good will which constitutes one of his most valuable assets. Such a discrimination is wholly arbitrary and unreasonable.

II.

The differential is directly at variance with the avowed objectives of the Milk Control Law.

The failure of any impartial State agency to endorse the differential is explained not only by its arbitrary and extraordinary character but also by the fact that, far from being in furtherance of the broad objectives of the Milk Control Law, it is directly at variance with them.

The avowed purpose of the Milk Control Law was to assure an adequate price for milk to the producer and thereby to protect the public milk supply from depletion. It is to be presumed that the prices to be charged by dealers were fixed for the purpose of assuring to dealers a reasonable return on their necessary investment and thus relieving the producer's price from undue pressure.

It is expressly provided that the price which the appellant is compelled to charge on sales to stores "shall not be fixed higher than is necessary to cover the costs of ordinarily efficient and economical milk dealers, including a reasonable return upon necessary investment", and that the fact that unadvertised dealers avail themselves of the privilege of the differential "shall not require fixing of the price higher than would otherwise be necessary." (Section 258-m, *supra.*)

The unadvertised dealers constitute the mass of dealers in the business and their average efficiency and economy must be the "ordinary" efficiency and economy to which the statute refers. Yet they are permitted to charge 1¢ less for their milk than the theoretically reasonable price fixed for the appellant's sales to stores. Thus the "independent" dealers are encouraged to charge for their milk approximately 10% less than is necessary, on the average, to give them even a reasonable return on their investment. Competition among them has, of course, forced the price for all

down to this theoretically inadequate level. They are by consequence put in a position in which they are continually tempted to "chisel" on the price which the statute has fixed for the protection of the producers and, through that means, for the protection of the public milk supply. This leads to the inevitable defeat of the principal objective of the Law (See the Report of the Director of the Division of Milk Control, R. 155-156).

The only possible escape from this conclusion is to assume that the price which the "independent" dealers are permitted to charge is actually sufficient to assure them a reasonable return on their investment. But if this be assumed, it follows that the real effect of the differential is to compel the appellant to overcharge the public in order to provide a trade advantage for its competitors.

III.

The "special" justification heretofore urged for the statutory differential is not borne out by the facts.

When this case was previously before this Court, a "special" justification was urged for the statutory differential, which, as the appellant understands it, was as follows:

First, the Milk Control Law, with its price-fixing provisions, is an emergency measure. Second, the Legislature will therefore presumably wish at some future time to put an end to the fixing of milk prices. Third, the fixing of a single price for all existing sellers in a particular line of business, when previous competition has included competition on price, is likely to injure those sellers who have previously competed on a low-price basis. Fourth, to guard against such a result, the Legislature in enacting an emergency price-fixing statute may constitutionally con-

tinue previously established competitive price differentials, whilst it provides for a lifting and fixing of the price structure as a whole.

In short, the fixing of the statutory differential was alleged to be "an effort to continue a condition which had obtained before the Milk Control Law was enacted." The existence of competitive precedent for the differential was therefore of the essence of the "special" justification, as it then was urged upon this Court. The investigation of the facts which has since been made disclosed that no such competitive precedent had ever existed.

It needs little argument to show that no competitive precedent for the differential can be found during the period of the price wars beginning in November, 1931; the market situation during that period was highly abnormal, and nothing approaching a stable price structure then existed. Nevertheless, the reluctance of the appellant and certain of the other advertised dealers to go the whole way in meeting the price cuts of some of the "independents"* has led to findings that a difference of one or more cents per quart existed during this period between the prices for bottled milk of the "independents" and of the advertised dealers. As already explained, however, these findings relate to the price of the milk alone, and in failing to recognize the effect of the abandonment of the bottle deposit by the two largest advertised dealers they do not really cover the question at issue. If this factor (which the Court below found was equivalent to a reduction in price of 2¢ per quart) is taken into account, the appellant's bottled milk prices were as low after July, 1931 as were the prices of the "independent" group taken as a whole; and in the case of certain of the more conservative "independents", the appellant's prices were actually lower.

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* It has been found that the prices of the milk that was distributed in New York City by the Dairymen's League were in practically the same range as those of the "independent" dealers (R. 289, Finding 31).

The Court below agreed with all this; but it insisted that the last four or five months of the price-war period had provided a competitive precedent for the differential, because the appellant then had restored its bottle deposit requirement, albeit such requirement was 2¢ less than the deposit asked by the "independent" dealers. The appellant's position is that a practice that had lasted four or five months only was not an established practice nor a competitive precedent, especially under the circumstances then existing which necessarily made the price policies of all dealers entirely provisional.

The Court below seems to have partially conceded the soundness of the appellant's position on this point; for it said in its opinion that it thought—

> "that a more reliable indication of the comparative command of the market by the 'independents' and 'advertised' dealers, was to be found before the industry had been faced with so critical a change [as that which was to result from the abolition of bulk milk]." (R. 313.)

Thus the Court's main reliance was the price relationships that had existed before the appellant abandoned its bottle deposit requirement in July, 1931. In this the Court went astray, for it failed completely to take note of the differences between the old store market for bottled milk, which had existed prior to the threat to bulk milk, and the new store market for bottled milk, which the abolition of bulk milk created. The new market was at least four times the size of the old market; and whereas the old market was obviously and distinctly a quality market, the new market was made up, to the extent of 80% of its total volume, of the old price-conscious purchasers of bulk milk. In view of these circumstances, any competitive difference in price which may have existed in the old market was no more a precedent for the statutory differential than a similar competitive difference in Philadelphia would have been.

There remains only the finding that "independent" dealers were selling bulk milk to stores at prices from 20¢ to 60¢ per 40-quart can below the prices charged by the advertised dealers. It should be observed that there is no finding that stores resold the bulk milk of "independent" dealers at prices lower than those charged for the bulk milk of the advertised dealers. There could be no such difference in price since bulk milk was not sold under trade names and consumers could not tell whose milk they were purchasing. In view of the wide range of prices at which bulk milk was always sold (R. 223, Plaintiff's Exhibit 1) the accuracy of the finding is open to serious doubt, but even assuming that it correctly states the facts it is of no significance whatever in so far as the statutory differential is concerned. It is the difference in price to the consumers that is vital, and there was none in the sale of bulk milk. The mere fact that "independent" dealers may have dissipated some or all of their buying advantage in price reductions on the sale of bulk milk to stores for the purpose of increasing their volume of business affords no warrant for establishing a fixed price differential in the sale of bottled milk to and by stores under radically altered market conditions.

The foregoing considerations make it clear that the statutory differential lacks any competitive precedent sufficient to support it. To the extent, if any, that it crystallized practices obtaining in the market, it did so only in respect of those practices which favored the "independent" dealers without making any allowance for the measures taken by the "advertised" dealers for their own protection. If conditions in the New York City store market before the enactment of the Milk Control Law are to be deemed a factor in determining the validity of the differential, then obviously all such conditions must be taken into account. Taking the weight from only one side of the scales must destroy the balance.

IV.

There could have been no reasonable doubt when the statute was passed that the differential would prove injurious to the appellant and it cannot be justified as an effort to protect existing dealers from losses which might result from the State's emergency price-fixing.

There is in the respondents' "special" justification a hint of a more general contention to the effect that the State, for the purpose of guarding against harm to existing sellers, may indulge in discriminations in emergency price-fixing statutes which would be constitutionally unjustified in permanent measures. The argument then would be that, despite the absence of competitive precedent, there was nevertheless a possibility of harm to the "independents", against which the State might properly protect them.

If the State's purpose were that of protecting existing sellers from possible untoward effects flowing from its emergency acts, the principle of equal protection would certainly require that the State should pursue that purpose with impartiality as between *all* existing sellers, "advertised" and "independent" alike. There is nothing in the nature of the purpose which the argument assumes which could justify discrimination by the State in the conferment of its protection. Since there was certainly no doubt when the statute was passed that the appellant was going to be injured, it follows that the differential cannot be justified on any such theory.

This is true even in the case of the 1933 Law. The size of the old bulk milk market was then well known; its price-conscious character was obvious; and it was certainly inferable that its addition to the store market for bottled milk would make this latter market equally price-conscious. How, then, could it reasonably have been doubted that the

enactment of the differential was going to work an affirmative injury to the appellant? And even if doubt were possible in 1933, none was possible in 1934 and 1935, when the differential was re-enacted. By then the heavy losses which the appellant had sustained in the conduct of its store business were matters of actual fact, not matters of inference, nor was there reasonable ground to doubt that the greater part of these losses was directly traceable to the differential. Whatever may be thought of the first enactment of the differential, the successive re-enactments in 1934 and 1935 certainly cannot be sustained on any theory of making the State's emergency price-fixing "painless."

V.

There was no ground for a reasonable belief by the Legislature that without the statutory differential the "independent" dealers would be eliminated, and the differential cannot be justified as an effort to preserve the "independent" dealers in the public interest.

Perhaps in recognition of the weakness of any argument that the differential had not injured the appellant, the Court below also based its decision on the alternative ground that "assuming that somebody's ox was bound to be gored", the Legislature was free to choose which of the existing dealers it would harm by its price-fixing measures.

The Court, of course, did not hold to the view that the Legislature's choice among the existing dealers could be capricious. Its points were two. It said, first, that "if the legislature really did suppose, as it had been told, that, put on even terms, the 'independents' would be put out of the market, it was a tolerable policy not to foster the concentration of a whole market into a few hands, or even into large units. * * * If the 'independents' were eliminated, that

was an economic hardship to them; it was permissible as an incident of the plan to prefer their survival to the absorption of the whole market by the 'advertised' dealers." (R. 316-317.) Second, it said that if the "independents" were eliminated, "the independent farmers, for whom they constituted the demand, must look elsewhere. The 'advertised' dealers who would presumably take up that part of the market from which they had extruded the 'independents', might create a substitute demand, or they might not. Conceivably they might supply the 'independents' ' old customers out of their surplus, which at the present time is larger than the necessary minimum". (R. 317.)

The Court's view that the Legislature was free to enact the differential with full knowledge that it would injure the appellant was obviously based on the premise that without the differential the "independent" dealers would be eliminated. That idea comes to the surface again and again throughout the opinion. Before considering the entire lack of factual support for such premise a word may be said concerning the resulting plight of the "independent" producers* suggested by the Court.

Although the appellant, unlike the "independent" dealers, contracts through a producers' cooperative association for its maximum requirements, and by consequence purchases a substantial amount of surplus milk, it does not purchase more milk than the exigencies of its business require. The appellant contracts to take all the milk of a sufficient number of producers to assure it an adequate supply during the period of lowest production. Any appreciable increase in the appellant's business would necessitate the taking on of additional producers, since the appellant's supply in the short season would otherwise be inadequate. To argue that the appellant could take care of additional business out of existing surplus involves the proverbial attempt to lift

* The term "independent producer" has generally been used to describe producers who are not members of Dairymen's League Cooperative Association or Sheffield Producers Cooperative Association (R. 283, Finding 4).

oneself by one's own boot straps. The argument is based upon a misconception of the purpose of the appellant in purchasing surplus milk.

But even assuming the worst for the sake of argument, it may be asked why the "independent" producer should be preferred to the organized producers who supply the advertised dealers. Individual producers do not have facilities for manufacturing or otherwise disposing of surplus milk. If there were no agency in the New York milk shed to purchase this surplus milk the attempts of the individual farmers to sell their entire production for fluid consumption would reduce the price of all milk to the low level of milk produced in other parts of the country under lower cost conditions. It was in order to avert this danger that producers formed cooperative associations and initiated the method of selling to dealers on the basis of the classified price plan. Through the medium of the cooperatives a large volume of surplus milk was kept off the fluid market and disposed of in an orderly fashion for manufactured products. But for the united action of the large body of producers who became members of the cooperatives, the price of milk would have sunk to a point below the level necessary to maintain an adequate supply for fluid consumption long prior to 1931, when the increase in the amount of surplus milk which was not subject to the control of the cooperative associations broke the price structure. In view of this, it is difficult to reconcile the penalizing of the organized producers whose efforts have been largely responsible for the survival of the "independent" producers, the more so in the light of the conclusion of the Pitcher Committee that "Universal application of the classified price plan and control of surplus milk by the producers through effective cooperative organization appears to offer the best prospect for permanent stabilization of the dairy industry in the New York milk shed." (Pitcher Report, p. 17).

Coming back to the premise underlying the Court's argument—that without the differential "independent"

dealers would be eliminated—it should be observed that no finding to that effect was made. The Special Master expressly declined to do so and said:

> "The voluminous proofs fail to furnish facts on which to base a finding as to the effect of minimum prices without a differential." (R. 305.)

The Court apparently did not disagree with the Master on this point, but made two additional findings to the effect that when the "independent" dealers tried to sell bottled milk to stores at the same price as the advertised dealers they were compelled by loss of business to resume their lower price, and that when customers were offered the several brands of milk at the same price they would usually take the advertised brands (R. 320-321, Findings 71, 72).

These added findings must, of course, be read in the light of the other facts appearing in the record. Prior to the threat to bulk milk most of the "independent" dealers were only incidentally interested in bottled business. While it has been found that a majority of them were selling "some" bottled milk to stores in November, 1931, their quickening interest in this business was a recent development which had evoked the abandonment of the bottle deposit requirement by the appellant some five months before. Under these circumstances it seems a nice question on how many occasions customers were actually "offered the several brands at the same price." This could have happened only in the case of stores handling both "advertised" and "independent" brands. But beyond this, there was, except during the period prior to July, 1931 when the interest of the "independents" in bottled milk was slight, quite literally no possibility of a customer being "offered the several brands at the same price" if all the elements of the customer's purchase are considered. Between July, 1931 and November, 1932 a customer who was offered the several brands "at the same price" was in reality asked to pay for the "independents'" milk 5¢ more

than he was asked to pay for the appellant's, and after November, 1932 he was in reality asked to pay 2¢ more. True, these excess payments for the "independents'" milk could be recovered if the consumer carried back his empty bottles to the store; but one does not have to be an expert in the milk business to see that the consumer's preference would be largely determined in such circumstances by *the apparent price of his purchase.*

It should also be observed that an "independent" dealer selling his milk at the same price (apart from the bottle deposit) as the appellant had to meet the low price competition of other "independent" dealers who were able to, and did, engage very generally in price-cutting.

Other facts of which this Court may take judicial notice further demonstrate the lack of basis for the premise that the "independents" could not survive without the differential. One of the most important of these is the character of the market at stake. The former purchasers of bulk milk were, as a class, largely indifferent to the health appeal upon which the appellant has mainly relied. The appellant does not doubt that a considerable number of these purchasers may prefer its milk; but it sees no reason to suppose that their patronage would exceed in volume the share which the appellant used to have in the bulk milk market. It should also be remembered that consumer preference operates very imperfectly in the store market. A purchaser on a house-to-house route makes a clean-cut decision between the various brands of milk since he is buying milk and nothing else. There is no such clean-cut decision by the store purchaser; most of the milk that is sold through stores in New York City is sold through grocery stores (Pitcher Report, p. 239*); and the consumers who buy their milk through stores buy it, in the main, where they buy the other articles of their food supply. There are doubtless some particular people who will go elsewhere in order to

* The confectionery stores and restaurants, which bulk large in the table referred to in the Pitcher Report, sell for consumption on the premises.

get their favorite brand of milk, but it is unlikely that there are many such persons among the one-time buyers of bulk milk. A storekeeper can sell virtually any brand of milk he wishes, if only its price is right; and, apart from the question of price, the storekeepers' trade is kept by the milk dealer largely on the basis of personal contacts. In the case of large dealers the contact man is the driver on the route; in the case of the smaller dealers, it may be the dealer-proprietor himself. For these reasons, it is quite impossible for the appellant to eliminate the "independents" in the store trade through any advertising appeal to consumers.

It is now over four years since the report of the Loose Milk Commission was made; the threat to bulk milk goes back somewhat further. During all this time, the "independents" have been pushing and selling their bottled milk (See, for example, Plaintiff's Exhibit 13, R. 228). It is undoubtedly true that the majority of them were unknown to the public when the threat to bulk milk first arose, but none of them is unknown, at least to the store-purchasing part of that public, at the present time. Large numbers of persons have been buying bottled milk bearing "independents'" names for the last four years or more and their sales have been increasing in proportion to the total amount of bottled milk sold through stores (R. 287, Finding 23). It is exceedingly unlikely that a legislative—or judicial—declaration that there is no legal basis for a higher charge for the appellant's milk would cause these people to shift their patronage to the appellant, especially in view of the imperfect operation of consumer preference in the store trade alluded to above.

If the danger of elimination of the "independent" dealers were a real one it would be natural to expect that "protective" measures in their behalf would have been enacted in at least some of the numerous other States which have fixed milk prices. The fact is, however, that nothing

in the nature of the statutory differential appears in the legislation of any other State (R. 293, Finding 48). And the differential in the New York Law does not operate outside New York City.

Whatever the Legislature may have thought at the time of the original enactment of the differential in 1933 when the ban on bulk milk was about to become effective, it is clear that in 1934 and 1935 the Legislature could not have entertained a rational belief that a failure to continue the differential would result in the elimination of the "independent" dealers. And looking at the other side of the picture, the injury to the appellant resulting from the differential was then an accomplished fact and daily assuming larger proportions. There was no longer room for speculation as to the probable fortunes of the "advertised" and "independent" dealers under the State's emergency price fixing legislation. The injury to the appellant had been clearly demonstrated and the possibility of regaining lost customers was daily becoming more remote.

VI.

The differential cannot be justified upon any ordinary principles of price-fixing; neither can it be defended as a measure designed to regulate advertising or to curb monopoly or to preserve freedom of economic opportunity.

In addition to the arguments thus far considered a number of others have been advanced in justification of the differential at various stages of these proceedings. Far from strengthening the defense, the multiplicity of these arguments is indicative of the difficulty of finding any tenable ground for justifying this singular piece of legislation. The true explanation of it has been studiously avoided by the respondents, and understandably so.

As one of the many strings to its bow, the Court below seized upon ordinary principles of price-fixing as affording adequate justification. It said that "nobody has ever supposed that prices should not be stepped to measure grades" and argued that "commercially the 'advertised' brands had come in the minds of the public to mean a different grade of milk." It conceded that the public may have been wrong, but said that "right or wrong, that is what it believed, and its belief was the important thing." (R. 315.) The Court also conceded that the differential would deprive the appellant of the commercial advantage of its long established reputation, but it said:

> "If that reputation tells the truth, its milk is really of a different grade, and the classification was right; if it does not tell the truth and the plaintiff has been persistently misleading the public all along, certainly the legislature might neutralize a spurious advantage in order to protect those who have not achieved a similarly undeserved reputation." (R. 316.)

This, we submit, badly confuses three very different things. There is, first, the question of whether a grade and a brand are the same thing; second, the power of the State to deal with unfair methods of competition; and, third, the relevancy of the Court's disapproval of the appellant's methods of advertising.

What the Court disapproved in the appellant's advertising was the repeated claim that the appellant's milk was the best, and its warnings to the public, during the period of the price wars, of the dangers of purchasing milk at the ridiculous prices at which much of the "independent" milk was then being sold.

The appellant has no apologies to offer for its advertising. The warnings which it issued against "bargain" milk were in accord with expert opinion and with the findings

of the Pitcher Committee.* The appellant can see nothing reprehensible in the efforts it made to apprise the public of what, unquestionably, it was in the public's interest to know.

However, if the appellant's reputation for superiority were actually undeserved, it would seem a strange constitutional principle that would permit the State to provide for a perpetuation of the fraud by requiring the appellant to charge for its milk a cent a quart more than the price of other milk which is, by hypothesis, equally good. It would seem much more reasonable—and, therefore, more probably constitutional—for the State to compel the appellant to charge no more for its milk than its more honest competitors.

But the real answer is, of course, that a brand and a grade are not the same, and no amount of playing with words can make them so. The various grades have been defined by the State; if the appellant's milk is superior, the superiority is not of the kind or extent which makes it a different grade. Moreover, the wording of the differential provision does not refer to grades; it refers only to trade names or brands.

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* Pitcher Report, pp. 70-72. Some of the statements there made are:

"The price of milk has a very definite relation to its quality." (p. 70.)

"Of course quality standards for market milk will be maintained during short periods when prices do not fully compensate producers or dealers for the necessary costs. However, an extended period of prices much below the costs of producing milk in accordance with these standards would inevitably have an unfavorable effect upon the quality of the milk supply." (p. 72.)

Dr. Paul B. Brooks, Deputy Commissioner of Health of the State of New York, wrote to the Pitcher Committee: "In my opinion, there is no doubt but that the low price received by the producer for milk and the general disturbed conditions in the milk industry are bound to have an unfavorable effect on the safety and general quality of milk sold in the state." (p. 72.)

Dr. James E. Russell, Chairman of the Milk Committee of the Department of Health of the State of New Jersey, stated: "In the long run, the public will get what it pays for. If sanitary regulations break down and become unenforceable, the public may get a cheap article, but it will not be either safe or wholesome." (p. 72.)

The essence of price-fixing is to fix a single compulsory price for products and services of equal grade; its meaning is that price competition is at an end, and that henceforth all competition shall be on the basis of quality, and selling and productive efficiency. In such a conception, there is no room for unequal prices for things of the same grade, whatever their brands or trade names. It follows that if the differential is to be justified at all, it must be on some other principle than those which lend support to ordinary price-fixing.

Besides the attempted justifications thus far considered, it has been suggested that the differential is an anti-advertising measure; that it is an anti-monopoly measure; and that it is a measure akin to the chain store tax statutes upheld by this Court in *Tax Commissioners* vs. *Jackson*, 283 U. S. 527; *Liggett Co.* vs. *Lee*, 288 U. S. 517; *Fox* vs. *Standard Oil Co.*, 294 U. S. 87. None of these hypotheses fits the case.

In the absence of special considerations such as those present in the trading stamp cases (*Rast* vs. *Van Deman & Lewis Co.*, 240 U. S. 342) the validity of a statute penalizing advertising in an ordinary commercial business is at least open to serious doubt. This Court would appear to have so intimated in its recent decision in *Semler* vs. *Oregon State Board of Dental Examiners*, 294 U. S. 608. There is, however, no occasion to consider this question here for the differential is clearly not an anti-advertising measure. It applies against new-comer dealers, whether they advertise or not; it applies to dealers who have been forced out and obliged to start over, whether they advertise or not; and it would apply to the appellant and the other advertised dealers even though they ceased to advertise. Moreover, it is certain that the State of New York has no policy against promoting the sale of milk through advertising. The State itself is now spending hundreds of thousands of dollars in the advertising of milk, in the hope of increasing

consumption and thereby improving the general condition of the industry (R. 290, Finding 38).

Apart from whether price regulation may be employed to curb monopoly (*Fairmont Creamery Co.* vs. *Minnesota*, 274 U. S. 1; *Williams* vs. *Standard Oil Company*, 278 U. S. 235), it is certain that the differential is not an anti-monopoly measure. The Court below found, as the Pitcher Committee did also, that at no time in recent years has any company had a monopoly, or even a near monopoly, of the business of distributing milk in New York City (R. 287, Finding 21). This finding was fully justified. The appellant in November, 1934 had only 15% of the business to which the differential relates; the Sheffield Farms Company only 17%; and M. H. Renken Dairy Company and Dairymen's League 2½% and ½% respectively (R. 287, Finding 22). The remaining 65% of the store business in New York City was divided among some 200 different dealers. It will be observed that the differential applies against Renken and the Dairymen's League, despite the comparatively small size of their businesses; likewise, that it applies against any dealer who has a "well advertised trade name", without regard to the size of his business; and likewise, that it applies against all new-comers in the milk-dealer field—"infant industries", as one might say—with the same rigor as against large and established businesses like the appellant's. *Mayflower Farms, Inc.* vs. *Baldwin*, 267 N. Y. 9. (An appeal from the decision in this case is pending before this Court [No. 349].)

As for the justification founded on the chain store tax cases, it seems clear that the differential was not intended to foster or preserve free and equal economic opportunity for the public as a whole. If such had been the intent of the statute, its privileges would have been made available to new-comer dealers, to dealers who had been forced out and obliged to start over, and, in general, to all dealers who were still small. Its privileges are not available to

such persons but are the monopoly of the favored group of dealers who were already in the field when the differential was first enacted and who were instrumental in procuring its passage. The present statute is therefore manifestly different in purpose and intent from the chain store tax statutes. Those statutes kept the door of economic opportunity open; the present statute slams it shut.

These same considerations were urged upon the Court below. Its reply was that the appellant could not complain of the effect of the statute upon others; that the exclusion of new-comers from the benefits of the differential was no concern of the appellant's, because the only effect upon the appellant was to make its favored competitors the fewer. The appellant is of course aware that one unaffected by an unconstitutional statute will not be heard to complain of its unconstitutionality; but it has never supposed that one admittedly affected by a statute in suit cannot advert to the irrationalities of a statutory classification in order to show what it was that the Legislature was really doing.

But even assuming, as counsel for the appellant in *Mayflower Farms, Inc.* vs. *Baldwin, supra,* is urging upon this Court, that the limitation of the benefits of the differential to those dealers who have been continuously engaged in business since the date of its original enactment may be stricken out and the remainder of the differential provision preserved, there would even then be no analogy between the differential and the chain store taxes. In the first place there is a well established distinction between tax statutes and police measures, which hardly requires extended comment. See *Connolly* vs. *Union Sewer Pipe Co.*, 184 U. S. 540; *Tax Commissioners* vs. *Jackson, supra.* The raising of revenue is a vital governmental necessity, and this Court has been reluctant to throw obstructions in the way of its effective accomplishment. Moreover, it is settled beyond the possibility of controversy that a State is at liberty to put a greater burden on one class of taxpayers than upon

another; i. e., to tax one kind of property, or one type of transaction, and to allow others to go untaxed. The courts are concerned in such cases solely with the question whether the tax imposed operates equitably upon all persons within the class selected to be taxed; and even within a class selected to be taxed, the principle of progression has been repeatedly recognized. The general distinction between tax cases and police power cases would seem to be a sufficient reason for refusing to regard those cases as precedents for differential price-fixing of any kind whatever.

To that is to be added the consideration that the effect of differential price-fixing is very different from the effect of such differential taxation as was involved in the chain store tax cases. Where there is a duty to charge a fixed price which is higher than one's competitors need charge, the handicap involved is immediate, omnipresent, and ineluctable. It is a direct interference with liberty of contract and with the dispositive element of private property. It handicaps one who is subject to it, *vis-a-vis* his customers, on every transaction which he attempts. These things the tax statutes involved in the chain store tax cases quite obviously did not do. They involved no interference whatsoever with contractual liberty or with the use of the taxpayer's property in the conduct of his business; relations with customers were left untouched; and while it is undoubtedly true that a taxpayer under them might conceivably be compelled to increase his prices to avoid insolvency, and thereby be put under a competitive disadvantage somewhat comparable to that imposed on the appellant here, that was obviously not true of all the taxpayers who were subject to them. It was true only of such taxpayers as were unable to pay their taxes out of available profits; all others had actual and effective options. And compulsion upon a necessitous taxpayer may exist with respect to his prices under any kind of tax statute whatsoever. Thus the effect of a differential price-fixing statute is so very different from the effect of the chain store tax statutes

—so much harsher, and so much more arbitrary—that the appellant submits that the doctrine of the chain store tax cases ought not to be extended to differential price-fixing of any kind whatever.

It is not necessary, however, to go quite so far to dispose of the present case. For, even if the principles of the chain store tax cases should be deemed to justify differential price-fixing for the purpose of limiting the growth of large scale economic organization, and of thereby keeping open the door of economic opportunity for the small man, the present statute, even when remade by striking out the limitation directed against newly organized dealers, would not fall within those principles. Even in such form the differential would appl against all milk dealers if their trade names were well advertised, regardless of the size or character of their businesses.

VII.

The differential was in reality a thinly veiled attempt by the "independent" dealers to preempt the New York City store market.

The only conclusion that can be drawn from an analysis of the differential in the light of the circumstances attending its enactment and its necessary effect upon the market to which it relates is that it was a measure deftly suggested by those dealers who were to receive its benefit as a concession which would permit the passage of the statute as a whole. The Special Master aptly described it as an "after-thought". From the point of view of its sponsors it was nothing more or less than a thinly veiled attempt to preempt a definite segment of the New York City market. It was for this reason that the appellant and the other advertised dealers were excluded, regardless of their mode

of operation and regardless of their size; that all newcomer dealers were excluded; and that all dealers who might for any reason be forced out of business and obliged to commence again were also excluded. In this manner everything possible was done to insure to the strongest of the "independent" dealers a monopoly of the store market.

VIII.

The novel character of the differential and the drastic penalty it imposes require that a clear justification for it be shown.

When this case was previously before this Court it was remanded in order that evidence might be taken for the purpose of determining whether any facts existed which would justify the differential. Its "novel, if not unique" character would of itself require that the factual justification for it be clear beyond a doubt. The one thing that the evidence clearly does reveal is the utter confusion which dominated the milk business in New York City in the years immediately preceding the enactment of the Milk Control Law (See pp. 14-15, *supra*). True, the Special Master extricated from this confusion the differences in price between the advertised and unadvertised brands which he embodied in the findings discussed above, but he concluded that under the circumstances "the previous existence of a difference in price does not afford a reasonable and sufficient basis for a statutory differential." (R. 303.)

The Court below, however, did not find it necessary to proceed upon the basis of the facts disclosed in the record. It again resorted to the presumption that the legislation was valid if there were any conceivable state of facts which would support it.

We submit that the conclusion of the Special Master is in accord with the prior decision of this Court and that it

correctly recognizes the basic principle involved. To sanction the differential in the absence of a clear showing of a definitely established and unqualified practice in the trade would make a shambles of legislative price-fixing.

Even assuming the utmost good faith on the part of the Legislature and the most scrupulous regard for the apparent equities of the situation, it must be clear that any attempt to fix prices upon other than the tangible bases of the quality and cost of the goods sold and of the services rendered will lead to serious injustice. The interplay of the countless factors which affect a competitive market is so complex and so difficult of accurate analysis as to proscribe legislative attempts to remedy incidental maladjustments.

The introduction of legislative price-fixing into an industry as highly competitive as the milk business is, of itself, in the nature of an untried experiment which must necessarily disturb existing economic laws and relations. And this is true even if the greatest care be taken to make proper allowances for real differences in quality and service. Once the Legislature goes beyond these recognized bases for establishing price differentials and, in response to the pressure of particular groups, attempts to adjust the ordinary and familiar differences in business relationships, the result is not difficult to foresee. The door is opened to the efforts of competing interests to convert a measure designed for the public welfare into a vehicle for private advantage. Abuse is certain.

Taking at their face value all the arguments urged by the respondents in support of the differential, they are in the last analysis arguments which should properly be addressed to the Legislature on the question of whether the advantages to be derived from the fixing of prices will outweigh the evils which may result. As the Special Master said, they are stronger arguments "*against* minimum prices than *for* a differential." (R. 304.) They do not justify an effort, even though it be a *bona fide* one, to avert a pos-

sible injury to one competitor by inflicting a certain injury on another. Much less do they justify or excuse an arbitrary and unreasonable discrimination "enacted at the instance and for the benefit of a particular class of dealers." (R. 305.)

IX.

The principle involved in the differential is fundamental. To sanction it would lead to dangerous and far-reaching consequences.

The respondents, unlike the Court below, have put their main reliance upon the "special" justification discussed above under Point III. This alleged justification in fact, however, is neither so "special" nor so forceful as to permit the respondents to avoid the fundamental issue which the differential presents.

If such a principle be once approved, limitations upon it would be difficult, if not impossible, to fix. If there may be a differential of one cent, why not two or three? And if there may be a differential for milk having a "well advertised trade name", why not for other products and services in respect of which the State may be empowered to fix prices?

It requires no argument to demonstrate the serious consequences of permitting a legislature, under the pressure of interested groups, to determine that one competitor's product is to enjoy a preference as against another's irrespective of cost, quality or other distinguishing factors. The building up of a good reputation through the sale of an honest product over a long period of years becomes not an asset but a handicap if the Legislature may step in and fix a higher price for such product while it permits a competitor to sell a similar product at a lower price. The competitor with an established reputation is thus denied

the right to meet the price of a lesser known rival. The public is required to pay more for the product which it wants or to abandon it in favor of a less desired product because the Legislature believes, or professes to believe, that one or more competitors are enjoying what the Legislature regards as too large a percentage of the market.

The State can and should take proper measures to see that competitive conditions in general are free from improper restrictions and are fair and equal. But if the Legislature is to be free to intervene in each competitive group in each community and to discriminate between competitors by arbitrarily establishing different prices for the same article, there can be but one result. Political intrigue and the pressure for advantage by one group against another will inevitably lead to oppression. The dangers are not illusory but real and practical ones.

X.

The differential is not an integral part of the Milk Control Law and may be declared invalid without invalidating the remainder of the statute.

The differential is not an essential nor even a proper part of the price-fixing structure established by the Milk Control Law. The bills recommended by the Pitcher Committee and by the Milk Control Board made no mention of it, and in similar legislation in other States it finds no place. It can be excised without invalidating the remainder of the statute.

Furthermore, in the very section in which the differential is contained the Legislature expressly provided that if any part of the statute should for any reason be adjudged to be invalid, such judgment should not affect, impair or invalidate the remainder of the statute but should be confined in its operation to the part involved in the controversy

in which the judgment should be rendered. There is nothing in the statute to rebut the resulting presumption that the Legislature would have enacted the statute without regard to the differential. *Champlin Refining Company* vs. *Commission*, 286 U. S. 210; *Smith* vs. *Cahoon*, 283 U. S. 553.

It is respectfully submitted that the decree of the United States District Court for the Southern District of New York should be reversed and a final decree entered for the appellant in accordance with the prayer of the amended bill of complaint.

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